

THE COURTS, EXPERT WITNESSES AND FIBROMYALGIA

Karen Capen

In Brief • En bref

Fibromyalgia, a condition that sometimes causes disagreement among physicians, has also been debated in several court cases that highlight the role of physicians as expert witnesses. Lawyer Karen Capen says physicians who provide expert opinion in court should be aware that there are specific requirements regarding their qualifications. In an Alberta court case, a judge discounted evidence provided by a rheumatologist who ran a clinic that treated fibromyalgia patients because of his "personal and perhaps financial interest in perpetuating the existence of this condition." The judge ruled that "this particular disorder is often found in individuals who will not or cannot cope with everyday stresses of life and convert this inability into acceptable physical symptoms to avoid dealing with reality."

Affection qui provoque parfois des désaccords chez les médecins, la fibromyalgie a aussi fait l'objet de débats dans le cadre de plusieurs poursuites devant les tribunaux où le rôle des médecins comme témoins experts a été mis en évidence. Karen Capen, avocate, affirme que les médecins qui témoignent comme experts devant les tribunaux devraient savoir qu'il existe des exigences particulières au sujet de leurs titres et qualités. Dans une affaire dont un tribunal de l'Alberta a été saisi, un juge a rejeté les preuves fournies par un rhumatologue qui dirigeait une clinique où l'on traitait des patients atteints de fibromyalgie parce qu'il avait un «intérêt personnel et peut-être financier à perpétuer l'existence de cette affection». Le juge a décidé que «ce trouble en particulier se manifeste souvent chez les personnes qui ne veulent ou ne peuvent faire face au stress de la vie quotidienne et somatisent cette incapacité en symptômes physiques acceptables afin d'éviter de faire face à la réalité».

Physicians are often called upon to act as expert witnesses in both criminal and civil-liability cases. In providing expert opinion, physicians should be aware that the law has specific requirements regarding experts' qualifications. They should be prepared to have their credentials and expertise closely scrutinized in court.

The nature of expert testimony on medical evidence varies considerably.

Often, physicians are asked to provide information on medical conditions that may be controversial, even within the medical profession. For example, a series of recent court cases illustrates the different responses of courts to the condition known as fibromyalgia, which has become the focus of a number of motor-vehicle-accident lawsuits in British Columbia. Since 1988, a number of judgements have recognized that fibromyalgia can occur following car-crash trauma.

It was reported recently that awards for general damages in BC have been as high as \$100 000, and now may amount to \$30 000 for nonpecuniary damages to compensate for soft-tissue trauma during a car accident. It has been noted that the number of claims in British Columbia has risen as court awards have increased.

In providing testimony in such cases, a physician who is accepted by the court as a qualified expert would be required, among other things, to provide a medically acceptable explanation of fibromyalgia. For example, the American College of Rheumatology has put forward its criteria for diagnosis of the condition for research purposes: widespread musculoskeletal pain, in combination with tenderness at 11 or more of the 18 specific tender-point sites on the person's body.

According to the college's guidelines on fibromyalgia, physicians who are examining the patient are expected to apply 4 kg of pressure with their thumb or forefinger on each tender-point site and document the patient's pain response each time. These criteria have been accepted by medical researchers in this field, but there has been no satisfactory scientific explanation — either a viral or other pathologic cause — to account for the pain and disability experienced by patients with fibromyalgia.

In testifying as an expert, physicians should be prepared to explain the basis for their professional opinion concerning this condition. This

Karen Capen, an Ottawa lawyer, articulated with the CMA's Department of Ethics and Legal Affairs.

would include an explanation of their specialty education and training, the number of years' work in this medical area and the number of patients they have treated who have this condition.

It would also require the physician to understand and acknowledge any controversy about the condition within the profession. One medical dispute is whether there is sufficient scientific data to support a causal relationship between accident-related trauma and fibromyalgia.

Medical experts attending a symposium on fibromyalgia held in Vancouver last year heard accounts of re-

willingness to consider that fibromyalgia may result from a motor-vehicle accident is the statement of one judge in *Goyer v. Stockand* (unreported, BCSC, Dec. 10, 1993) that "it is in the nature of fibromyalgia that prior life problems intermingle."

More recently, a judge in Alberta came to an opposite conclusion. In *Mackie v. Wolfe* (unreported, Alberta Court of Queen's Bench, June 10, 1994), Judge Bonnie Rawlins rejected the plaintiff's claim that an accident had caused fibromyalgia, and even stated that the condition does not exist. A number of medical experts

and it was caused by the accident. She said that this condition caused her intermittent pain and numbness throughout her body, that she had difficulty sleeping and that she was no longer able to perform her pre-accident work duties. She also claimed that she had lost a job she liked and that her marriage had suffered because of her condition.

Medical evidence was given on her behalf by a rheumatologist who operated a clinic in North Carolina, which specialized in the treatment of fibromyalgia. He testified that there is often a temporal relationship between trauma suffered during an accident and the onset of symptoms of fibromyalgia. He concluded after reviewing her medical reports and examining her that Mackie had all 18 tender points, and that she had a moderate to moderately severe case of fibromyalgia.

Expert witnesses were called on behalf of the defendant driver to challenge the opinion of Mackie's expert. A psychiatrist testified that the condition known as fibromyalgia could be more accurately described as a personality disorder called "hysterical conversion," in which the person's perception of psychosocial stress is converted into acceptable physical symptoms.

Judge Rawlins had this to say about the experts' testimony: "The evidence . . . satisfies me that the symptoms diagnosed as fibromyalgia are a relabelling [by rheumatologists] of a condition . . . that has been with mankind for hundreds of years and represents a personality disorder. This particular disorder is often found in individuals who will not or cannot cope with everyday stresses of life and convert this inability into acceptable physical symptoms to avoid dealing with reality."

The judge also said she discounted evidence provided by the rheumatologist who ran the North Carolina clinic because of his "personal and perhaps financial interest

A psychiatrist testified that the condition known as fibromyalgia could be more accurately described as a personality disorder called "hysterical conversion," in which the person's perception of psychosocial stress is converted into acceptable physical symptoms.

search comparing the condition with chronic fatigue syndrome, "Gulf War syndrome," sick-building syndrome and repetitive-strain injuries. Similarities in the symptoms of these conditions were reported, including generalized pain, disturbed sleep patterns, fatigue and depression.

However, the work of the participating international experts also made clear that there is insufficient scientific evidence to allow for a clear causal relationship between trauma and fibromyalgia. A range of other possible causes were noted, including: infection, surgery, emotional or physical trauma, and emotional or physical stress. There were also cases of fibromyalgia in which no distinct originating event could be identified.

The condition is usually referred to as a "syndrome" because it comprises a range of symptoms that often occur together, with no known cause. Even though medical science has not acknowledged any certainty on this issue, courts in BC generally appear to be willing to be convinced.

One indication of the BC courts'

testified for the plaintiff and for the defence.

Yvonne Mackie's car was hit by a truck while she was driving on the Trans Canada Highway in Alberta. Although it did not appear that she or any members of her family who were in the car at the time were injured, several hours after the accident she developed severe headache and pains in her neck and shoulder. Mackie eventually was forced to take a leave of absence from her work as a patient-care coordinator because of the severity of her pain.

As her symptoms became worse, Mackie required a number of medications and sought the help of rheumatologists, a neurologist, a neurosurgeon, a psychiatrist and an orthopedic surgeon. Although she was able to return to work for a short time, she eventually went on another leave on the advice of one of her doctors. The trial began 8 years after the accident.

Mackie's claim against the driver of the other vehicle was that she has the condition known as fibromyalgia,

in perpetuating the existence of this condition." On the other hand, the judge relied heavily on the evidence of the psychiatrists who appeared for the defence, saying that they had provided the court "with common-sense medical explanations for this condition and behaviour."

Although the *Mackie* decision is not binding on other trial courts, and some courts have recognized fibromyalgia as a condition for which damages may be awarded, many physicians and their patients have reacted to it with concern. The judge in *Mackie* looked to medical experts for assistance in arriving at her decision, and their testimony was referred to extensively in the written judgement.

In general, any physician who is going to act as an expert witness

should keep certain factors in mind: the physician should be qualified as a specialist in or have extensive experience concerning the condition, and should be aware that there will be opposing expert medical testimony.

A recent British case cited by Ontario Justice Ellen MacDonald in *Perricone v. Baldassarra* sets out five guidelines for expert evidence, which apply to physicians and others giving "expert" testimony:

- The evidence should be seen to be the independent product of the expert, and to be uninfluenced by the case itself.
- The expert should provide independent assistance to the court through an unbiased opinion on matters within his or her expertise.
- The expert should state the facts

or assumptions that provide the basis for the opinion and must not omit material facts that detract from the opinion.

- Experts should state when a particular question or issue falls outside their expertise.
- Experts must indicate if their opinions are provisional because there is insufficient scientific data to support them.

In her decision dismissing a lawsuit under the Ontario Motorist Protection Plan in *Perricone*, Justice MacDonald found that the report provided by one medical expert was lacking in objectivity, and gave little weight to that evidence.

The judge in the *Mackie* case appears to have come to a similar conclusion about fibromyalgia, also based on expert medical opinion. ■

Nov. 9-10, 1995: Canadian Coordinating Office for Health Technology Assessment 5th Regional Symposium — Economic Evaluation: Its Role in Decision Making

Vancouver

Conference coordinator, Canadian Coordinating Office for Health Technology Assessment, 110-955 Green Valley Cres., Ottawa ON K2C 3V4; tel 613 226-2553, fax 613 226-5392

Les 9 et 10 nov. 1995 : 5^e symposium régional de l'Office canadien de coordination de l'évaluation des technologies de la santé — L'évaluation économique : son rôle dans la prise de décision

Vancouver

Coordonnatrice des conférences, Office canadien de coordination de l'évaluation des technologies de la santé, 110-955, rue Green Valley, Ottawa ON K2C 3V4; tel 613 226-2553, fax 613 226-5392

Du 9 au 11 nov. 1995 : 2^e conférence nationale sur l'asthme et l'éducation (organisée par l'Université Laval)

Québec

Crédits de l'éducation médicale continue.

A. Les McDonald, directeur exécutif, Réseau

canadien pour le traitement de l'asthme, 1607-6, Forest Laneway, Willowdale ON M2N 5X9; tel 416 224-9221, fax 416 224-9220

Nov. 9-11, 1995: 2nd National Conference on Asthma and Education (hosted by Université Laval)

Quebec City

Study credits available.

A. Les McDonald, executive director, Canadian Network for Asthma Care, 1607-6 Forest Laneway, Willowdale ON M2N 5X9; tel 416 224-9221, fax 416 224-9220

Nov. 13-14, 1995: From Hospital to Community: Working Together to Support Breastfeeding (sponsored by La Leche League Canada)

Ottawa

Agnes Vargha, 25 Bernier Terr., Kanata ON K2L 2V1; tel 613 592-2379, fax 613 599-7298

Nov. 15-17, 1995: 7th International Symposium: Caring for Survivors of Torture — Challenges for the Medical and Health Professions

Cape Town, South Africa

Official language: English

International Rehabilitation Council for Torture Victims, Borgergade 13, PO Box 2107, DK-1014 Copenhagen, Denmark; tel 011 45 33 76-0600, fax 011 45 33 76-0500

The Trauma Centre for Victims of Violence

and Torture, Cowley House, 126 Chapel St., Cape Town 8001, South Africa; tel 011 27 21 45-7373, fax 011 27 21 462-3143

Nov. 17-19, 1995: Quebec Association of Urologists 20th Annual Meeting

Montreal

Jacqueline Deschênes, Quebec Association of Urologists, 2 Complexe Desjardins, East Tower, 30th floor, Montreal QC H5B 1G8; tel 514 350-5131, fax 514 350-5181

Du 17 au 19 nov. 1995 : 20^e réunion annuelle de l'Association des urologues du Québec

Montréal

Jacqueline Deschênes, Association des urologues du Québec, 2 Complexe Desjardins, Tour de l'est, 30^e étage, Montréal QC H5B 1G8; tel 514 350-5131, fax 514 350-5181

Nov. 23-25, 1995: Ontario College of Family Physicians 33rd Annual Scientific Meeting

Toronto

Ontario College of Family Physicians, 2630 Skymark Ave., Mississauga ON L4W 5A4; tel 905 629-1600, fax 905 629-4810